



RQ-889

# Texas State Board of Medical Examiners

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APR 23 1996

FILE # ML-38768

I.D. # 38768

April 17, 1996

Opinion Committee

Honorable Dan Morales  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

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OPEN RECORDS DIVISION

RQ-889

Re: Opinion Request - Associations of Physicians and Podiatrists and authority of Texas State Board of Medical Examiners

Dear General Morales:

An Attorney General Opinion is respectfully requested under the authority of the Section 22 of Article IV of the Texas Constitution and Sections 402.041 through 402.045 of the Texas Government Code. An opinion is requested concerning the authority of the Texas State Board of Medical Examiners ("the Board") to promulgate rules to authorize physicians and podiatrists to engage in the practice of medicine through co-ownership of a professional association.

The enabling statute for the Texas State Board of Medical Examiners is the Medical Practice Act ("the Act"), Tex. Rev. Civ. Stat. Ann., article 4495b (Vernon Supp. Pamphlet 1996). The general powers and duties of the Board are delineated in section 2.09 of the Act, which specifically provides the Board with authority to make rules and regulations which are not inconsistent with the Act as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in Texas, and enforce the Act. The Board is also authorized under section 3.06(b)(12) to designate activities which are exempt from the Act; however, the Board's authority in this regard is presumably limited to granting exemptions from the application of the Medical Practice Act and not the application of other statutes which may apply.

The Board has received a petition for rule making to authorize podiatrists and physicians to practice medicine through a co-owned professional association. This petition is enclosed and marked as Exhibit A. It is my understanding that the Office of the Secretary of State has long viewed such an arrangement to be prohibited by the Texas Professional Association Act, Tex. Rev. Civ. Stat. Ann., article 1528f. Enclosed and marked as Exhibit B is a copy of a sample letter in which this view is explained.

Consequently, prior to proceeding further with rule making on this matter, the Board is seeking additional information by way of this request for an opinion. It is requested that the following questions be specifically addressed in an Attorney General Opinion:

- (1) Does the Texas State Board of Medical Examiners ("the Board") have authority to make a rule that allows podiatrists and physicians to co-own professional associations for the purpose of rendering their respective professional services?
- (2) If the Board has such authority, what are the general limitations, if any, concerning such rule making?

An opinion which addresses these questions is requested. If additional information is needed please contact either me or the Board's General Counsel, Tim Weitz.

Respectfully,



Bruce A. Levy, M.D., J.D.  
Executive Director

xc: Allen Hymans  
Executive Director  
Texas State Board Podiatric Examiners  
P.O. Box 12216  
Austin, Texas 78711

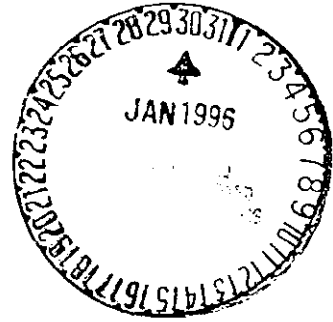
Christopher G. Sharp  
Expressway Tower, Suite 520  
6116 North Central Expressway  
Dallas, Texas 75206

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

CHRISTOPHER G. SHARP, P.C.

ATTORNEY AND COUNSELOR AT LAW  
EXPRESSWAY TOWER, SUITE 520  
6116 NORTH CENTRAL EXPRESSWAY  
DALLAS, TEXAS 75206



CHRISTOPHER G. SHARP

January 25, 1996

TEL. (214) 368-3600  
FAX (214) 368-3632

Bruce Levy, M.D., J.D.  
Executive Director  
Texas State Board of Medical Examiners  
333 Quadalupe  
Tower Three, Suite 610  
Austin, Texas 78701

RE: Petition for Rule Making on behalf of The Austin  
Diagnostic Clinic Association

Dear Dr. Levy:

I am enclosing an original and two copies each of a Proposal for Adoption of Rule and a Request for Public Hearing Concerning Adoption of Rule for filing with the Board. I would appreciate your file-stamping the spare copies and returning them to me in the enclosed self-addressed stamped envelope.

I would appreciate your asking Jeff McDonald to notify me of the date and time that the Proposal will be placed on the Board's agenda as well as of the time of any public hearing which may be scheduled.

I have discussed these issues preliminarily with Tim Weitz who may be able to supply you with some background on this matter.

Thank you very much for your courtesy and assistance.

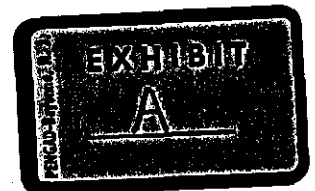
Respectfully submitted,

Christopher G. Sharp

CGS\kitz

Enclosures

cc: Mr. Tim Weitz (w/Enclosures)  
Mr. Michael R. Sharp (w/Enclosures)  
Mr. Robert Spurck (w/Enclosures)  
Richard Tallman, M.D. (W/Enclosures)  
Mr. Jon Sligh (w/Enclosures)



TO: The Texas State Board of Medical Examiners  
333 Quadalupe  
Tower 3, Suite 610  
Austin, Texas 78701

FROM: The Austin Diagnostic Clinic Association  
12221 Mopac Expressway North  
Austin, Texas 78758-2401

PROPOSAL FOR ADOPTION OF RULE

COMES NOW, THE AUSTIN DIAGNOSTIC CLINIC ASSOCIATION, ("Proponent"), and files this proposal for the adoption of a rule with the Texas State Board of Medical Examiners, ("Respondent"), and furnishes the following information to Respondent:

I.

Proponent is interested in rules regulating the legal relationships among health care providers engaged in group professional practices because it is a physician-owned Texas Professional Association engaging in the practice of medicine and having employees and shareholders who are licensees of Respondent as well as at least one employee who is a licensed Podiatrist.

II.

Proponent seeks the adoption of a new rule concerning co-ownership of a Texas Professional Association by physicians and podiatrists. Proponent is a Texas Association having a membership greater than 25 persons.

### III.

Proponent requests Respondent to promulgate a new rule permitting "M.D.'s, D.O.'s and/or D.P.M.'s" to engage together in the group practice of medicine through co-ownership of a professional association.

### IV.

Proponent contends that this rule is necessary because:

- (A) Section 3.08(15) of Article 4495b prohibits ". . . aiding or abetting, directly or indirectly, the practice of medicine by any person, partnership, association or corporation not duly licensed to practice medicine by the board";
- (B) The Texas Professional Association Act, Article 1528f, Section 2(A) apparently permits ownership by podiatrists of a professional association;
- (C) Article 1528f, Sections 2(B)8, 10, (A)(3) 21, all clearly contemplate that a professional association may be formed to provide a single professional service, despite the recent change in Section 2(A), "including podiatry";
- (D) The amendment to Section 2(A) of Article 1528f occurred in 1991;
- (E) Two old Attorney General Opinions which relate to this issue have been published:
  - 1. M-551, in 1970, states that after January 1, 1970,

the provisions of Article 1528f are applicable only to individuals licensed to practice medicine by the Texas State Board of Medical Examiners, and

2. M-1185, in 1972, states that podiatrists may not create a professional association under Article 1528f.

(F) In 1971, the legislature repealed former Section 2(B) of Article 1528f.

The repealed section read as follows:

"Activities. No professional association organized pursuant to this Act shall engage in more than one type of professional service."

The implication of the repeal of old Section 2(B) of Article 1528f is that more than one type of professional service is permitted to be performed by a Texas Professional Association.

Unfortunately, the rest of Article 1528f, including those Sections cited in paragraph (C) above, still contemplate a single service;

- (G) The Medical Practice Acts' prohibition in Section 2.07(C) against "fee-splitting" by physicians with non-physicians, as well as the above-cited prohibition against "aiding or abetting", creates a dilemma for any Texas Professional Association desiring to associate with

any health care provider who is not a licensee of the  
Texas State Board of Medical Examiners.

WHEREFORE, Proponent requests the Texas State Board of Medical  
Examiners to hold a public hearing concerning the adoption of and  
to adopt a rule permitting co-ownership of a professional  
association among physicians and podiatrists.

Respectfully submitted,

CHRISTOPHER G. SHARP, P.C.

By: Chris Sharp  
CHRISTOPHER G. SHARP  
Texas State Bar #18115200  
Expressway Tower, Suite 520  
6116 N. Central Expressway  
Dallas, Texas 75206  
(214) 368-3600  
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ATTORNEY FOR PROPONENT

TO: The Texas State Board of Medical Examiners  
333 Quadalupe  
Tower 3, Suite 610  
Austin, Texas 78701

FROM: The Austin Diagnostic Clinic Association  
12221 Mopac Expressway North  
Austin, Texas 78758-2401

REQUEST FOR PUBLIC HEARING CONCERNING ADOPTION OF RULE

COMES NOW, THE AUSTIN DIAGNOSTIC CLINIC ASSOCIATION, ("Petitioner"), and files this request for a public hearing concerning the adoption of a Rule with the Texas State Board of Medical Examiners, ("Respondent"), and furnishes the following information to Respondent:

I.

Petitioner is interested in rules regulating the legal relationships among health care providers engaged in group professional practices because it is a physician-owned Texas Professional Association engaging in the practice of medicine and having employees and shareholders who are licensees of Respondent as well as at least one employee who is a licensed Podiatrist.

II.

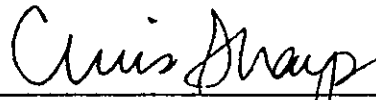
Petitioner formally requests Respondent to hold a public hearing concerning the adoption of a Rule permitting co-ownership of a professional association among physicians and podiatrists, in



accordance with Government Code Section 2001.029. Petitioner is a Texas Association having a membership greater than 25 persons.

Respectfully submitted,

CHRISTOPHER G. SHARP, P.C.

By:   
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Dallas, Texas 75206  
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FAX (214) 368-3632

ATTORNEY FOR PETITIONER



**Antonio O. Garza, Jr.**

Secretary of State

## Office of the Secretary of State

September 28, 1995

David W. Hilgers  
Hilgers & Watkins  
San Jacinto Center, Suite 1300  
98 San Jacinto Boulevard  
P.O. Box 2063  
Austin, TX 78701



**RE: Member/Ownership of a Professional Association**

**Dear Mr. Hilgers:**

Since 1970 the secretary of state has fielded questions regarding membership in a professional association, as well as related questions concerning the issuance of shares in a professional association; and since 1970, the secretary of state has taken the position that units of ownership or shares in a professional association may only be held by individuals licensed to perform the same professional service for which the professional association was formed. Jeffrey King's correspondence requests that this office reconsider its position and accept his conclusion that either a nonprofit corporation certified under the Texas Medical Practice Act, TEX. REV. CIV. STAT. ANN., article 4495b (the TMPA), or a professional association organized under the Texas Professional Association Act (TPAA), TEX. REV. CIV. STAT. ANN., article 1528f may own shares in a professional association. This office has considered Mr. King's arguments, but still holds to its position regarding the restriction on share ownership.

Mr. King's position and analysis are based upon his interpretation of the definition of the word "license" in the TPAA and the usage of the word "person", in the TPAA, TMPA, as well as other statutory provisions. Mr. King attributes great significance to the fact that Section 3 of the TPAA assigns the following definition to the term "license": 'The term license includes a license, certificate of registration or any other evidence of the satisfaction of state requirements.' Mr. King argues that "There would be no need to include this sentence in Section 3 if the only permitted members of a PA were licensed individuals." Mr. King goes on to state that this definition of "license" does not limit membership or ownership of the PA to licensed individuals, but includes any juristic person which may practice medicine under the provisions of the TMPA—a nonprofit



corporation certified under § 5.01 of the TMPA and, indirectly, a professional association. However, legislative intent cannot be determined by looking only at isolated portions of the TPAA; it is to be read as a whole, giving purpose and meaning to every part. See, Ex parte Pruitt, 551 SW2d 706 (1977).

It is best to remember that the Texas Professional Association Act (SB 745) and the Texas Professional Corporation Act (SB 589) are in *pari materia* and were both passed by the 61st Legislature in its Regular Session. Therefore, it is presumed that they are endowed with the same spirit and each should be construed in the context of the other in determining the legislative intent regarding ownership of corporations/associations organized for the practice of a profession. See, Eastern Texas Electric Co. v. Woods, 230 SW 498 (Tex. Civ. App.--Beaumont 1921, ref. n.r.e.); Bowling v. City of Pearland, (Tex. Civ. App.--Houston 1972, ref. n.r.e.); Op. Tex. Att'y Gen. No. M-551 (1970).

Senate Bills 589 and 745 were enacted to provide a legal framework for the incorporation of a professional practice, thus allowing licensed professionals a means of achieving those federal tax advantages afforded to corporations and not allowed to solo practitioners or professional partnerships. See, Hamilton, Professional Corporation Acts, 24 Southwestern L.J. 94 (Texas) (1970). In the late 1960's, spurred by tax litigation and Treasury regulations, states, including Texas, enacted professional association or professional corporation statutes to provide licensed professions with a new business form which would provide the requisite corporate characteristics. Texas, unlike the other states, enacted both a professional corporation act and a professional association act. The Texas Professional Corporation Act became effective January 1, 1970, and the Texas Professional Association Act became effective June 18, 1969.

If one compares Senate Bills 589 and 745, one sees that apart from some minor differences between the two, the acts are similar. Indeed, the similarity of purpose of both acts is such that until January 1, 1970, the effective date of the TPCA, articles of association by non-medical professionals were filed by the secretary of state as there was no other statute in effect under which professionals could incorporate/associate. It may be inferred from the inclusion of Section 11 of the TPAA (which refers to the practice of law under the TPAA), that the act was intended to apply to all professionals, thus allowing any professional to form an association which would qualify for corporate tax treatment by the IRS prior to the effective date of the TPCA. After January 1, 1970, all professionals, excluding physicians, surgeons, and doctors of medicine, could then form corporations under the TPCA.

Both the professional association and the professional corporation are organized for the purpose of rendering no more than one type of professional service; both acts require the filing of organizational documents with the secretary of state; both allow a single practitioner to form an association/corporation; both have centralized management in a board of directors; each act requires that the articles of association/incorporation identify and provide the address of each of the original

members/shareholders; each act indicates that the person providing the professional service will be liable for that person's negligence and that the association/corporation shall be liable for that person's negligence; and each act allows for the issuance of shares or "units of ownership."

The definitions section of the TPAA, Section 3, defines "professional service" as follows: "...any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license, and which service by law cannot be performed by a corporation." The definitions section of the TPCA, Section 3, defines "professional service" as follows: "...any type of personal service which requires as a condition precedent to the rendering of such service, the obtaining of a license, permit, certificate of registration or other legal authorization, and which prior to the passage of this Act and by reason of law, could not be performed by a corporation..." If we read Section 3 of the TPAA and Section 3 of the TPCA, it would appear that the two acts define "professional service", and the legal authorization necessary to perform that service, in essentially the same terms.

The "broadness" Mr. King remarks upon as an indication of legislative intent to allow juristic persons to form, manage and own an interest in a professional association is not supported by the legislative intent evidenced by the TPCA, an act passed by the same legislature and which had a similar purpose. Section 3(b) of the TPCA clearly restricts share ownership in a professional corporation, (as opposed to ownership of a professional legal corporation) to "individuals who themselves are duly licensed or otherwise duly authorized" to render the same professional service as the corporation. The "broadness" used in defining the term "license" simply relates to differences in terminology when referring to the type of "legal authorization" a professional may require for the practice of a professional service. Some professionals may be *certified* or *registered* to practice their profession rather than *licensed*.

Mr. King indicates that, as the TPAA does not define the word *person*, his June 1st letter focused upon other statutory definitions of the term 'to foreclose any automatic assumption that person meant individual'. However, it is unnecessary for the act to define the term *person* since the act only refers to persons licensed to practice or perform a professional service. Section 2(A) of the TPAA provides for the formation of a professional association by "one or more persons duly licensed to practice a profession...". Members, officers, and directors of a professional association are required to be "licensed to perform" the type of professional service for which the professional association was formed. [See, Sections 8, 9 and 21 of the TPAA] Section 10 of the TPAA allows shares or units of ownership in a professional association to be transferable to "persons licensed to perform the same type of professional service as that for which the professional association was formed." When determining the meaning of the phrase "licensed person" one must look to the terms and construction of the licensing statutes. See, Op. Tex. Att'y Gen. No. M-526 (1969). The Texas Medical Practice Act sets forth the requirements for obtaining a license in §3.04.

(a) An applicant, to be eligible for the examination and issuance of a license, must present satisfactory proof to the board that the applicant:

- (1) is at least 21 years of age;
- (2) is of good professional character;
- (3) has completed 60 semester hours of college courses other than in medical school, which courses would be acceptable, at the time of completion, to The University of Texas for credit on a bachelor of arts degree or a bachelor of science degree; and
- (4) is a graduate of an acceptable medical school or college that was approved by the board at the time the degree was conferred and has completed a one-year program of graduate medical training approved by the board.

As Bill Didlake, Deputy Director of the Corporations Section, stated in his June 13th letter to Mr. King: "These requirements are so restrictive that a person other than an individual person is not able to meet them and thus become licensed by the Texas State Board of Medical Examiners." It is the position of the secretary of state that the formation, management, and membership/ownership of a professional association is restricted to individuals who are licensed to render the same professional service which is to be provided by the professional association. [See, Op. Tex. Att'y Gen. No. M-551 (1970) which construes the TPAA and the TPCA and which specifically states that after January 1, 1970, the TPAA applies only to individuals licensed by the Texas State Board of Medical Examiners.]

This position is further supported by Attorney General's Opinion No. H-1143 (1978) which interpreted former article 4447s (now Section 161.061, Health & Safety Code) relating to disclosure of certain agreements for the payment of laboratory tests. Section 1 of former article 4447s read in part as follows:

No person licensed in this state to practice medicine, dentistry, podiatry, veterinary medicine, or chiropractic shall agree with any clinical, bioanalytical, or hospital laboratory, wherever located, to make payments to such laboratory for individual tests, or test series for patients, unless such person discloses on the bill or statement to the patient or third party payors the name and address of such laboratory and the net amount or amounts paid to or to be paid to such laboratory for individual tests...

Attorney General Opinion No. H-1143 held, in part, that while the professional members of the association or organization were subject to the provisions of article 4447s, the act did not apply to a professional association or other organization of physicians as an organization cannot be "licensed in this state to practice medicine" ' [citing Rockett v. Texas State Board of Medical Examiners, 287 SW2d 190 (Tex. Civ. App --San Antonio 1956, ref'd n.r.e.)]

David W. Hilgers  
September 27, 1995  
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It may well be that the provision and regulation of health care has changed dramatically in the 25 years since the TPAA went into effect, and that the Board may feel that owner/membership of a professional association by other professional associations or certified nonprofit corporations does not contravene public policy; however, this office cannot alter the language of the statute to obtain the result you and Mr. King desire. While Mr. King's interpretation of the provisions of the TPAA may provide "useful structural and transactional tools" for physicians or podiatrists, it must be left to the legislature to provide the means for accomplishing such transactions as it has done in the past. When greater flexibility in transferability of interests in a professional legal corporation was desired, it required a legislative act to amend Section 12 to specifically allow the issuance of shares in a professional legal corporation to "individuals, professional legal corporations, and foreign professional legal corporations." (See, Acts 1991, 72d Leg., Ch 901, Sec. 80, eff. Aug. 26, 1991.) The legislature has also considered amending the professional limited liability company provisions of article 1528n. House Bill 1425, considered last legislative session, proposed to amend Part 11 of the Texas Limited Liability Company Act regarding professional limited liability companies, to clearly provide for membership by a "professional individual" or "professional entity", thus allowing the formation of "multi-tiered" professional entities.

In closing, while the current TPAA may not provide a creative solution to one of the hypothetical scenarios described in Mr. King's June 22d letter, it will allow the creation of PA(2) for the disgruntled associate of PA(1) by means of a plan of merger adopted by the shareholders of PA(1) pursuant to Section 25 of the TPAA and Part 5 of the Texas Business Corporation Act (TBCA). (See, article 1.02(12)(a), TBCA).

As your letter of August 3, 1995 requested a detailed response supporting our position, I have enclosed copies of Deputy Director Didlake's correspondence with Jeffrey King. Should you desire a judicial interpretation of the TPAA, you may submit for filing to this office articles of association identifying a professional association or certified nonprofit corporation as the initial member or organizer of the professional association. Pursuant to article 9.04 of the TBCA, you may appeal the secretary of state's disapproval of such articles in any district court of Travis County.

Sincerely,



Carmen Flores  
Legal Counsel  
Statutory Filings Division

enclosures

David W. Hilgers  
September 27, 1995  
Page 6

c. Clark K. Ervin  
Assistant Secretary of State

Richard Riehl  
General Counsel

Lorna Wassdorf  
Deputy Assistant Secretary

Bill Didlake  
Deputy Director

Timothy E. Weitz  
Texas State Board of Medical Examiners

Jeffrey P. King  
Haynes and Boone, LLP